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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. PATRICK WILSON, Defendant and Appellant.	A131551 (Alameda County Super. Ct. No. C162823)

Defendant Patrick Wilson seeks reversal of a final judgment entered after a jury found him guilty of multiple sexual offenses and the court sentenced him to 58 years to life in state prison. Defendant argues that the trial court prejudicially violated his federal constitutional rights by allowing the prosecutor to improperly comment to the jury about defense DNA testing and agreeing with the prosecutor that the jury should disregard questions raised by the defense in closing argument about the statistical methods used by the prosecution expert witness regarding the DNA evidence, and that the prosecutor engaged in prejudicial misconduct. We find no error or prejudicial misconduct, and affirm the judgment.

BACKGROUND

In an amended information filed in December 2010, the Alameda County District Attorney charged defendant with one count each of sexual penetration by a foreign object (Pen. Code, § 289, subd. (a)(1)),[1] forcible rape (§ 261, subd., (a)(2)), kidnapping for the purpose of committing robbery (§ 209, subd. (b)(1)), and forcible oral copulation (§ 288a,

[1] All statutory references herein are to the Penal Code unless otherwise stated.

subd. (c)(2)). It was further alleged regarding the three sex crimes that defendant was armed and personally used a firearm (§§ 667.61, subd. (e)(4),[2] 12022, subd. (b), 12022.3, 12022.5, 12022.53, subd. (b)) and kidnapped the victim, thereby increasing the risk of harm to her (§ 667.61, subds. (d)(2), (e)(1)) and, regarding the kidnapping for robbery count, that defendant personally used a firearm (§§ 12022.5, subd. (a), 12022.53, subd. (b)). It was further alleged that defendant had five prior convictions, including one prior strike pursuant to sections 667, subdivisions (a) and (e)(1) and 1170.12, subdivision (c)(1), and that three of his prior convictions were "prison priors" within the meaning of section 667.5, subdivision (b).

Trial began in December 2010.

Jane Doe's Testimony

The victim, Jane Doe, testified that she exited a BART train at the MacArthur BART station in Oakland, at approximately 8:00 or 8:30 p.m. on January 19, 2003. As she came down the escalator, she noticed a Black man standing at the bottom of the escalator wearing a boldly colored black and white checkered outfit. As she walked along Martin Luther King Boulevard towards her home, she noticed the man was walking 10 to 20 feet behind her, laughing and talking on his cell phone.

Doe further testified that, as she continued to walk, the man wrapped his arm around her neck and pressed what she thought was a gun against her side. The man said, "Check this out. Don't make me pop you." The object he pressed against her felt long and hard, like a barrel of a gun, although she did not actually see what it was. The man forced her to cross the street and go into a nearby, unlit park. She asked if he was going to hurt her; the man said no and asked if she had any drugs or money. Doe replied that she had only 50 cents and a BART ticket.

Doe said the man forced her to go through a hole in a fence and up a hillside to a clearing, where it was very dark. Doe did not cry for help or try to get away because she was afraid that he would kill or hurt her if she said anything.

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[2] The Legislature subsequently redesignated former section 667.61, subdivision (e)(4) as subdivision (e)(3), effective September 9, 2010. (Stats. 2010, ch. 219, § 16.)

Doe testified that the man told her to take off her clothes, and took some of them off himself. Doe feared for her life. He put his fingers in her vagina, licked her breasts, orally copulated her, made Doe kiss him with her tongue, and put his penis in her vagina. He then took her BART ticket and 50 cents from her pocket and left.

At some point in the incident, she noticed his hair was braided and beaded, but she did not get a good look at the man's face nor was she able to tell his age, although she told the police he was 18 to 20 years old based on his behavior with his cell phone. When asked at trial if she could identify defendant as the man who sexually assaulted her, she stated that she could not.

When Doe was leaving the park, she met another woman, who told her she saw a man running towards the BART station. Doe ran home, partially dressed and shoeless, and there, frightened and crying, she told her mother about the assault. Her mother called the police, who arrived in three to five minutes An officer took her in an ambulance around the corner to identify three possible suspects. Doe said that none of them looked like her assailant because none were wearing the distinctive clothing she saw on the man. She was taken to Highland Hospital, where she was given a sexual assault examination.

Doe further testified that about five years later, in 2008, the police showed her a photo lineup consisting of six photographs and asked if she could identify the person who assaulted her. She could not because she never saw her assailant's face. Asked by an officer if she could state off the record who she thought her assailant maybe could be, she picked the photograph of defendant because he was the only one with braids in his hair.

Jane Doe acknowledged at trial that during a break in the preliminary hearing earlier in 2009, at which she testified, she disclosed for the first time that defendant had orally copulated her. She testified at trial that she had been reluctant to reveal this on the night of the incident because her mother was sitting with her when she gave her initial report, and that she believed the word "rape" included oral copulation. She told her husband and cousin, but not her mother. She had not intentionally left the fact out, and was prompted to disclose it after a conversation with her cousin, who asked her about it, reminding Doe of this fact. She had no doubt that it occurred.

Testimony Regarding the Swabs of Biological Evidence Obtained from Doe

Martin Moran, the nurse who conducted the sexual assault examination of Jane Doe, also testified. He noted an injury to Doe's vagina consistent with a sexual assault and collected swabs from her breasts, vagina, and the perianal area around the anus (this last swab referred to as the rectal swab herein). The nurse observed sperm cells on the vaginal sample.

An Oakland Police Department evidence technician testified that she took possession of the biological evidence from Highland Hospital early in the morning of January 20, 2003.

Testimony of Chani Sentiwany

Criminalist Chani Sentiwany of the Oakland Police Department Crime Laboratory (police lab) testified as an expert in forensic DNA analysis. She said that in 2003, she conducted DNA testing on the biological evidence obtained from Doe and determined a DNA profile for the sperm cells found on the vaginal swab and rectal swab using the COfiler and Profiler Plus testing kits that she employed at the time, which enabled examination of 13 loci.

Sentiwany also tested DNA present on the breast swab collected from Doe. She was only able to examine nine loci using the Profiler Plus kit because less DNA was available on the breast swab. She separated her results into a major donor and minor alleles. She found that Doe matched the major donor profile for each of the nine loci, and could not be eliminated as the major source of biological material on the breast swab. She also determined that the sperm donor from the vaginal and rectal swabs could not be eliminated as the possible minor donor of DNA found on the breast swab.

Approximately five years later, in 2008, DNA from a buccal swab was obtained from defendant. Sentiwany tested the sample and determined defendant's DNA profile using the expanded Identifiler DNA testing kit, examining the Profiler Plus and COfiler loci and two additional markers, for a total of 15 loci. Defendant's DNA profile matched the vaginal and rectal evidence samples Sentiwany tested in 2003 at each of the 13 loci examined in these previous samples. Sentiwany testified that the profile was extremely

rare. By her most conservative ethnic demographic estimate, the DNA profile she found existed in 1 out of 10 quadrillion members of the population.

Regarding the breast swab, Sentiwany determined that defendant could not be excluded as the minor donor to the DNA found on the breast swab. She acknowledged that it is "a lot more clear to see a major donor profile than a minor donor profile," and that she did not have a full profile of the minor donor. According to Sentiwany, the probability of possessing a DNA profile that could have contributed to this mixture of DNA was 1 in 84,000.

In calculating her statistical probabilities, Sentiwany used a computer program called "POPs Stats."

DISCUSSION

I. *The Prosecutor's Comments About Defense DNA Testing*

Defendant argues that the trial court, by permitting the prosecutor to comment on the availability of the DNA samples for retesting by the defense and argue that any favorable results would have been presented at trial, prejudicially violated defendant's federal Sixth Amendment rights to effective assistance of counsel and violated his Fifth Amendment right against self-incrimination.[3] We disagree.

A. *The Proceedings Below*

1. *Pre-Trial*

Before trial, the court ordered the Oakland Police Department to release the biological evidence to a laboratory retained by the defense, and further authorized collection of a reference of DNA sample from defendant by the defense for comparison purposes. Subsequently, the defense moved in limine to exclude "any reference to the fact that the DNA evidence in this case was available for retesting, was sent to . . . [a

[3] In his opening brief, defendant also refers to a violation of his federal constitutional right to due process of law, but does not present any substantive argument to support this assertion. Therefore, we disregard it. " '[E]very brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration.' " (*People v. Stanley* (1995) 10 Cal.4th 764, 793.)

defense lab] for retesting, or was in fact retested." The defense argued that allowing in this evidence would, among other things, violate defendant's Sixth Amendment right to the effective assistance of counsel, which encompassed the right to consult with expert witnesses in confidence, as well as his federal due process right to fully investigate and prepare a defense.

The prosecution filed a cross-motion to permit introduction of the fact that untested portions of the biological evidence were made available to the defense for analysis, and that it should be permitted to comment on the fact that the defense did not call a witness to testify that independent testing determined any result that was different than that determined by the police lab.

After hearing argument, the trial court denied the defense motion and granted the prosecution motion. It ruled that the prosecutor could introduce evidence that the biological evidence was made available to the defense for retesting and comment on the defense failure to present evidence of any results from such retesting.

2. *Trial*

At trial, the prosecutor told the jury in his opening statement, without objection from the defense, that there would be evidence that the police lab prepared samples of the biological evidence "pursuant to a court request to send to be retested by the defense." The prosecutor elicited testimony from Sentiwany that the police lab preserved untested biological evidence and the victim's reference sample in a frozen state and subsequently prepared portions of them for retesting. Sentiwany stated that she provided evidence samples to be sent to a private lab and sent them off to be retested.

The defense, in cross-examining Sentiwany, raised a number of questions about the DNA evidence and test results. The defense suggested that her interpretation of the DNA mixture on the breast swab was nothing more than an "educated guess," emphasized that biological evidence sample and reference sample profiles were generated five years apart from each other using different techniques, suggested that the vaginal and rectal swabs could have been, but were not, subsequently retested by the police lab using the more advanced test kits available, which examined 15 loci, with possible different

results, explored the possibility that a sibling of defendant could have shared defendant's DNA profile, referred to "adventitious matches" of some loci between profiles in DNA databases, and highlighted the chance of erroneous results "if even one number was off" in the chart of DNA test results.

Defendant contends in his opening brief that the prosecution during its rebuttal "repeatedly told the jury that the defense had retested the DNA evidence." Defendant cites three improper statements by the prosecutor, which we place in italics as follows:

First, the prosecutor commended the defense counsel on conceding that the "chemistry" of the police lab testing was correct "because of course his own retesting undoubtedly proved that fact to be true. *I mean, we know he had the evidence retested.*" (Italics added.)

Shortly thereafter, the prosecutor stated, "*I guarantee that the DNA was retested at 15 loci*." (Italics added.) Defense counsel objected to this statement as "purely speculative." The court reminded the jury that if it did not remember the evidence it could request a read back of testimony, and that "the attorneys can only argue from the evidence that was presented."

The prosecutor then continued with his rebuttal. He told the jury that it had no evidence of retesting, "but the judge has already made a ruling that I get to comment on the fact of the retest and any inferences that you can draw from that. . . . *What that means is that you get to know that [defense counsel] sent the DNA to be retested at a lab*." (Italics added.) Defense counsel again stated, "same objection."

The court then held a sidebar conference that is unreported, after which the prosecutor continued with his rebuttal. He stated: "You will recall when I asked Ms. Sentiwany if the Identifiler kit, the one that tests up to 15 loci, if that's available to all defense labs that is [*sic*] produced by Applied Biosystems. What did she say? She said yes. So again, I told you before, I told you the first time, the defense is not obligated to present anything to you, but you can draw reasonable inferences about why they produced no evidence to contradict the match and [defense counsel] is conceding that the chemistry was correct."

The trial court instructed the jury multiple times that the People bear the burden of proof. For example, it instructed that the presumption of innocence "requires that the People prove a defendant guilty beyond a reasonable doubt"; "[b]efore you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt"; the defense "may rely on the state of the evidence and argue that the People have failed to prove the charges beyond a reasonable doubt"; "[y]ou may not convict the defendant unless the People have proved his guilt beyond a reasonable doubt"; and "[t]he People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved."

Furthermore, the court instructed the jury that "[n]either side is required to call all witnesses who may have information about the case or to produce all physical evidence that might be relevant."

The jury was also specifically instructed that the attorneys' remarks in their opening statements and closing arguments were not evidence, and that "[o]nly the witnesses' answers are evidence."

3. *Motion for a New Trial*

After the jury returned its verdict, defendant moved for a new trial. Among the reasons stated was that the prosecutor's references to defense retesting violated his Sixth Amendment right to effective assistance of counsel. The trial court denied the motion.

B. *Analysis*

1. *Defendant's Sixth Amendment Claim*

Defendant first argues that his Sixth Amendment right to effective assistance of counsel was violated by the court's allowing the prosecutor to make the comments we have described to the jury, relying principally on *Prince v. Superior Court* (1992) 8 Cal.App.4th 1176 (*Prince*). His argument is unpersuasive.

In *Prince*, the appellate court considered whether the trial court's ruling that the prosecution could observe defense DNA testing of evidence contained on vaginal swabs

was constitutionally improper. (*Id*. at p. 1179.) The appellate court concluded that defendant's Fifth Amendment privilege against self-incrimination was not violated because it protected testimonial communications only, which were not implicated by the trial court's order, but concluded that defendant's Sixth Amendment right to effective assistance of counsel was infringed upon. (*Prince*, at pp. 1179-1180.) After noting that effective assistance of counsel includes the assistance of experts in preparing a defense and communication with them in confidence (*id*. at p. 1180), the court stated, "While it is true the goal of the judicial process is to find the truth, allowing the defense to conduct an independent test of the DNA will not unfairly prejudice the People or result in injustice. If the test matches Prince with the crime, defense counsel will not call the expert and the case will proceed on evidence already possessed by the People as if the defense test had not been made." (*Ibid*.)

Prince is inapposite because it determined a different issue than that before us: whether the prosecution was entitled to be present during defense DNA testing. The *Prince* court's reference to the case proceeding as if this testing never occurred if the defense chose not to call its expert, which defendant emphasizes in his reply brief, is dicta. The other cases that defendant discusses in support of his argument are similarly inapposite. (See *People v. Hutchinson* (Colo. 1987) 742 P.2d 875 [holding that the prosecution could not call an expert retained by the defense as a witness]; *United States v. Alvarez* (3rd Cir. 1975) 519 F.2d 1036, 1045-1047 [finding error where the trial court admitted testimony by a psychiatrist retained by the defense, but called by the prosecution].)

On the other hand, the People cite multiple California cases in which our Supreme Court has indicated that, although the prosecution cannot refer to a defendant's failure to take the stand in his own defense, " 'that rule "does not extend to comments on the state of the evidence or on the failure of the defense to introduce material evidence or to call logical witnesses." (*People v. Lewis* (2009) 46 Cal.4th 1255, 1301, 1304 [rejecting, among other things, a Sixth Amendment challenge to prosecutor's comments in closing argument].) The court has noted that "[t]he failure of a defendant to call an available

witness whom he could be expected to call if that witness testimony would be favorable is itself relevant evidence. The omission traditionally has been considered an admission by conduct—an admission that the witness's testimony would not be favorable." (*People v. Ford* (1988) 45 Cal.3d 431, 448.)

As the People indicate, our Supreme Court rejected a Sixth Amendment challenge regarding similar circumstances in *People v. Bolden* (2002) 29 Cal.4th 515 (*Bolden*). There, the defense before trial moved to exclude evidence of a police lab's testing of the blood found on a knife carried by a defendant when he was arrested, in a case in which defendant was charged with stabbing a man to death. (*Id.* at pp. 526, 530, 548-549.) At the subsequent "*Kelly*" hearing (see *People v. Kelly* (1976) 17 Cal.3d 24 [establishing a test to determine the admissibility of scientific evidence]), the court permitted the prosecution to call a defense expert who had been present at the police lab testing. (*Bolden*, at pp. 548-549.) After evidence of the defense expert's participation came out during trial (he did not testify), the prosecutor told the jury in closing argument to "consider the failure of the defense to call . . . the expert the defense had hired to collaborate in that testing. (*Id*. at pp. 549-550.) Defendant argued that the trial court erred in denying the defense motion to exclude all evidence of the defense expert's participation in the testing, and that the court's ruling violated his state and federal constitutional rights to the effective assistance of counsel, among other things. (*Id*. at p. 550.) The Supreme Court rejected the claim. (*Ibid*.)

Although other cases cited by the People besides *Lewis* did not consider a Sixth Amendment challenge, they also indicate that a prosecutor commenting in similar ways is not improper. In *People v. Panah* (2005) 35 Cal.4th 395, the court considered whether the prosecutor engaged in misconduct when the prosecutor, responding to the defense pointing out that the prosecution had not produced fingerprint or DNA evidence, said the defense could also have conducted these experiments. (*Id*. at p. 464.) The court considered the comment fair rebuttal, noting that it was not improper for a prosecutor to comment on a defendant's failure to introduce material evidence or call on logical witnesses. (*Ibid*.)

Also, in *People v. Wash* (1993) 6 Cal.4th 215, the defendant, accused of first degree murder, rape, robbery and burglary, contended that when he confessed certain things to police "he wanted to 'seem as guilty as possible' " and " 'wanted to die.' " (*Id.* at p. 262.) During closing argument, the prosecutor told the jury, " 'There's nothing wrong with him [defendant]; what have you heard that's wrong with him? [¶] There has been no . . . psychiatric or psychological testimony; even though people have been contacted from his family about that.' " (*Ibid.*) Our Supreme Court rejected a claim that the prosecutor's remarks improperly referred to matters outside of the record. The court determined that the prosecutor did not err in making these remarks because "prosecutorial comment upon a defendant's failure 'to introduce material evidence or to call logical witnesses' is not improper. [Citations.] Thus, we do not find the prosecutor erred on the whole in observing that defendant had failed to adduce expert psychiatric testimony to support the claim that he was depressed and suicidal when he confessed to the crimes." (*Id.* at p. 263.)

Similarly, in *United States v. Grammer* (9th Cir. 1975) 513 F.2d 673, the prosecution elicited testimony from its own FBI fingerprint specialists that the fingerprint evidence was examined for two to three hours by a defense expert who was not called by the defense. (*Id.* at p. 676.) The prosecution subsequently argued to the jury that its own expert's identification of the defendant's fingerprints on stolen checks was uncontradicted, although the defense expert had the opportunity to study the same prints. (*Ibid.*) The Ninth Circuit found this argument was not prosecutorial misconduct. (*Ibid.*)

Defendant gives us no reason to reach a conclusion contrary to these cases. His Sixth Amendment argument is unpersuasive.

2. *Defendant's Fifth Amendment Claim*

Defendant also argues that the prosecutor's comments to the jury indicated that defendant had subjected the DNA to testing and found nothing different from what the police lab found, thereby forcing defendant to disclose information that he never intended to disclose at trial in violation of his federal constitutional right against self-incrimination. This claim also lacks merit.

Defendant relies entirely on a Nevada state court case for his claim, without explaining its relevance. Defendant's citation, *Binegar v. Eighth Judicial Dist. Ct.* (1996) 112 Nev. 544, 551, contains a discussion of Nevada statutes that required a defendant to disclose the names and addresses of prospective witnesses, as well as witness statements and the results or reports regarding mental and physical examinations and scientific tests or experiments, even if the defendant did not intend to call these witnesses or use these statements or materials at trial. (*Ibid*.) The court concluded such disclosures violated a defendant's constitutional guarantees against self-incrimination. (*Ibid*.) However, the case is inapposite to the circumstances here, in which a prosecutor commented to a jury, including in ways identified as speculative, about the defense's failure to call an expert to discuss its own testing of DNA evidence that was made available to it.

As we have already discussed, one of the cases cited by defendant makes clear that Fifth Amendment rights against self-incrimination are only implicated when testimonial communications are involved. (*Prince v. Superior Court, supra,* 8 Cal.App.4th at p. 1179.) Such communications are not implicated here. Furthermore, as the People point out, numerous federal cases have determined that the Fifth Amendment privilege is not implicated regarding a defendant's decisions about evidence other than his own testimony. "As long as evidence can be solicited other than from the mouth of the accused, it is proper to comment upon the failure of the defense to produce it." (*United States v. Gomez-Olivas* (10th Cir. 1990) 897 F.2d 500, 503; see also *United States v. Mayans* (9th Cir. 1994) 17 F.3d 1174, 1185 [same].) "The defendant's decisions about evidence other than his own testimony do not implicate the privilege, and a comment on the defendant's failure to call a witness does not tax the exercise of the privilege. It simply asks the jury to assess the value of the existing evidence in light of the countermeasures that were (or were not) taken." (*United States v. Sblendorio* (7th Cir. 1987) 830 F.2d 1382, 1391.) Defendant's Fifth Amendment claim lacks merit.

In light of our conclusions, we do not discuss the parties' debate regarding whether any error by the trial court was harmless.

II. *The Court's Comment About the DNA Statistical Methodology*

Defendant also argues that the trial court prejudicially erred when it allowed the prosecutor's rebuttal argument regarding the statistical methods used by the police lab regarding the DNA evidence, and endorsed these comments. Defendant argues the court's actions violated his Sixth Amendment and due process rights. Again, we conclude his argument is unpersuasive.

A. *The Proceedings Below*

The defense challenged the admissibility of the prosecution's DNA evidence and requested a *Kelly* hearing. Defense counsel agreed that a hearing regarding whether the scientific technique used was generally accepted within the scientific community was not necessary because the testing technologies used "have all been approved by the courts as being scientifically reliable, at least in the abstract." Instead, defense counsel sought a hearing at which it intended to focus on whether the correct scientific procedures were used in this case. The *Kelly* hearing was subsequently held. The court ruled that there were no irregularities or anything that would preclude the jury from considering evidence on the procedures Sentiwany employed.

In his opening statement, defense counsel attacked the reliability of the prosecution's DNA rarity statistics. He contended that the jury would conclude at the end of the case that nobody could precisely predict the rarity of the DNA profiles involved, and that even Sentiwany could not do so.

In her testimony, Sentiwany described the methodology by which she calculated the frequency with which the DNA profile she obtained from the biological evidence would appear in general population groups. She stated that the genetic characteristics of each location used for forensic testing purposes are "all inherited independently of the others"; thus, one can employ the product rule because one value does not predict another value. She also stated that "the population information that was gathered to show how frequent or rare these alleles occur is in published journal articles, so that's accessible to outside people."

During Sentiwany's cross-examination, defense counsel focused on challenging the statistical basis for calculating the random match probability, including the "product rule" and the " 'Hardy-Weinberg equilibrium' theorem." Sentiwany testified that "the product rule uses the fact that each area of the DNA is inherited independently from the other one[.]" She also said that within one locus, forensic DNA scientists assume that the allele inherited from one parent is unaffected by the allele inherited by the other parent, as would be consistent with patterns of random mating. She identified this as the "Hardy-Weinberg equilibrium," and further testified that there are compensating adjustments built into the frequency estimate formulae. In the random match probability calculation, this adjustment is termed "theta factor" and given a particular value, .01 percent. She said that "almost all" DNA analysts in the United States use the same population frequency calculations that she used to derive for statistical estimates, indicating that this method was the standard in the field.

Questioned further, Sentiwany did not agree that forensic science experts disputed the validity of developing statistical probabilities based on the published sample sizes used for that purpose. She also testified that she was familiar with the report of adventitious partial matches in an Arizona database. However, she testified that the data was not generated as part of a study, and that there had been no follow-up.

The prosecutor stated in his initial closing argument to the jury that DNA evidence was the standard, highly reliable, powerful evidence, and "[p]robably the most reliable current method for establishing identity that science knows." The prosecutor further argued that nothing Sentiwany testified about "indicated that there is anybody in the scientific community who questioned that those frequency statistics are reliable as used by forensic chemists in this country." The defense made no objection to any of these remarks.

In his closing argument, defense counsel attacked the reliability of the DNA statistics, without objection from the prosecution. He questioned the statistical methodology used by Sentiwany, including the validity of using population samples of 200 to 300 people to determine the allele frequencies. He asserted that scientists could,

but did not, use large law enforcement and military DNA databases. He argued that the validity of the product rule depended upon flawed assumptions regarding kinship in breeding patterns, and that these assumptions underlie the Hardy-Weinberg equilibrium. He also suggested that the statistics used ignore the possibility that defendant's brother shared his DNA profile.

In his rebuttal, the prosecutor responded to the defense arguments by first contending that it was "completely impermissible" for the defense to ask the jury to "judge the validity of the product rule." The defense objected to the argument that it was inappropriate for the jury to consider the product rule, to which the court agreed. After a sidebar, the prosecutor stated:

"With respect to the product rule, it is important to understand a little background about any science that comes to you in a court of law in the State of California.

"First of all, a scientist can't just walk in here and start talking about scientific procedures. When DNA first became used in a criminal forensic setting, there were extensive hearings on whether DNA evidence, and in this case the PCR-STR testing, whether these were widely accepted in the scientific community as being legitimate science. As being acceptable science. All right.

"Nobody ever got to hear DNA like you heard today until it went all the way to the California Supreme Court and back down saying that scientific methodology has been widely accepted in the scientific community."

Defense counsel objected to this line of argument because "[t]he question isn't the admissibility of the DNA." The court overruled the objection. The prosecutor continued, "In addition, this product rule that [defense counsel] wanted to represent himself as an expert in, the same thing has happened. That product rule has been ruled by the California Supreme Court . . . ." This led to the following exchange:

"[DEFENSE COUNSEL]: Judge, I object to this.

"THE COURT: All right, ladies and gentlemen. [The prosecutor] is right as far as his interpretation of the case. The science has been established. The process has been

established. How it's applied in the particular case is subject to criticism in a particular case. [¶]

"[DEFENSE COUNSEL]: Yes. Correct. You decide all that.

"[PROSECUTOR]: I haven't said anything different, although I keep getting interrupted.

"It's for you to decide the weight of it. But what [defense counsel] is asking you to do is question very validity of it because he's asking you to say: Well, if I as a juror here don't really think that the Hardy-Weinberg principles of equilibrium apply, then that can undermine the product rule and therefore that can create reasonable doubt.

"Well, on a lot of fronts that's wrong because again, the California Supreme Court . . . .

"[DEFENSE COUNSEL]: Judge, I object to this. This is apples and oranges.

"[PROSECUTOR]: I think I've made it clear what I'm arguing. The weight of it is something you get to decide. The weight of it. [Defense counsel] is asking you to question the very foundation of the numbers by asking you to sit here and do something that the California Supreme Court has already done. It's already vetted the science.

"[DEFENSE COUNSEL]: I object to—

"[PROSECUTOR]: Can we stop having objections that are illegitimate?

"[DEFENSE COUNSEL]: It goes to admissibility, not the weight."

The court and attorneys then held a conference in chambers, after which defense counsel stated that he did not want to interrupt unnecessarily, but instead sought "to have a continuing objection to this line of questioning for the reasons I've already stated." The court indicated that was acceptable, and that "we can amplify the record later." The prosecutor continued. In his opening brief, defendant points out that the prosecutor stated: "the whole point of this law is it's not up to the juries and the law doesn't want it to be up to juries to litigate the very admissibility of science in the courtroom once it's been established as accepted. There is a time for that when it's not accepted. When it has to be established. The product rule has been established, and so it's not for you as jurors to say: Wow, I wonder about the Hardy-Weinberg theory of equilibrium."

Later, outside the presence of the jury, the court and counsel discussed the fact that defense counsel made a motion for mistrial during the conference in chambers, which the court denied. Defense counsel stated, "I do have to say that I stand on what I said before. Commenting on what the *Kelly-Frye* rule is in front of the jury is not appropriate and I welcome an appeal review of that because I'm confident in what the result is going to be."

B. *Analysis*

Defendant argues that "[t]he trial court's comment to the jury that the prosecutor 'was right' in that the 'science has been established' was erroneous to the extent that it endorsed the prosecutor's position that the defendant could not legitimately attack the product rule and the Hardy-Weinberg equilibrium as tools that could establish beyond a reasonable doubt that [defendant's] DNA sample proved him to have been the perpetrator of the crimes charged in this case." (Fn. omitted.) Defendant argues that just because "scientific evidence is admissible under the Kelly/Frye standard, that evidence is not beyond criticism at trial." Therefore, [i]n endorsing the prosecution's condemnation of this argument, the trial court improperly intruded on [defendant's] Sixth Amendment right to the effective assistance of counsel and to trial by jury, which encompasses the right to present final argument."

Defendant's argument fails for a very simple reason: the trial court's comment to the jury was not as characterized by defendant in his appellate claim. That is, the trial court's comment did not instruct the jury that defendant could not legitimately attack the product rule or the Hardy-Weinberg equilibrium "as tools that could establish beyond a reasonable doubt that [defendant's] DNA sample proved him to have been the perpetrator of the crimes charged in this case." Rather, as our review of the proceedings indicates, the court's comment came after the prosecutor pointed out to the jury that the California Supreme Court had already determined that the product rule had been widely accepted in the scientific community, and in effect concurred with this statement.

Specifically, the defense objection in effect was that the prosecutor's argument went to the question of admissibility, not weight and, therefore, was somehow

inappropriate. The trial court immediately made clear to the jury that how the "process" (an apparent reference to the process of applying the product rule) was "applied in a particular case is subject to criticism in a particular case," and that it was up to the jury to "decide all that." The prosecutor followed the court's comments by stating, "I haven't said anything different" and "[i]t's for you [the jury] to decide the weight of it." After defense objection that the prosecutor was comparing "apples and oranges," the prosecutor said, "The weight of it is something you get to decide. The weight of it."

Thus, it appears from the record that defense counsel's objection, reiterated later outside the presence of the jury, was that the prosecution should not be allowed to argue that the basics of the statistical methodology employed by Sentiwany had been found by our Supreme Court to be sufficiently reliable to be admissible. On appeal, defendant does not base his claim on this objection. Rather, he argues that certain prosecutor comments that defendant refers to in his opening brief, as endorsed by the court, prohibited him from presenting a closing argument about the application of this statistical methodology to his particular case. This is not so. The court only concurred with the prosecutor that the basics of the statistical methodology—in particular, the product rule—had been found sufficiently reliable by our Supreme Court to be admissible evidence. Furthermore, the court indicated immediately after the complained-of comments, and the prosecutor readily acknowledged, that the weight of the evidence was for the jury to determine. In light of this context, defendant fails to establish that the court foreclosed his arguments about the application of the statistical methods to his particular case, such as when his counsel argued that Sentiwany's methodology did not take into account the possibility that defendant's brother shared his DNA profile.

In short, defendant does not explain why the jury could not be informed by the prosecutor, with the court's approval, that the basics of the statistical methodology employed by Sentiwany had been found admissible by our Supreme Court, nor why the court's comment prevented him from effectively arguing that this methodology, as applied to the particular circumstances of his case, did not sufficiently establish his guilt. Defendant's argument, therefore, is unpersuasive. In light of our conclusion, we do not

address the remainder of the arguments made by the parties, including regarding whether any error by the court was harmless.

III. *Prosecutorial Misconduct*

Finally, defendant argues that the prosecutor, "[i]n addition to bolstering the reliability of the DNA evidence based on facts not in evidence, . . . improperly vouched for the evidence when he 'guaranteed' the jury that the defense had retested the DNA evidence, . . . and suggested that if an exonerating result had existed that such evidence would have been presented to them." Defendant has forfeited some of his claim and, assuming for the sake of argument the prosecutor committed misconduct by his statements, there was no prejudice.

A. *Applicable Legal Standards*

Under California law, a prosecutor engages in misconduct by " ' "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." ' " (*People v. Espinoza* (1992) 3 Cal.4th 806, 820.) Under federal law, a prosecutor commits misconduct when he or she engages in a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." (*People v. Harris* (1989) 47 Cal.3d 1047, 1084.) Such misconduct must be prejudicial under the usual state and federal standards. (*People v. Watson* (1956) 46 Cal.2d 818, 836 [state]; *Chapman v. California* (1967) 386 U.S. 18, 24; see *People v. Booker* (2011) 51 Cal.4th 141, 186 [citing *Watson* and *Chapman* as the standards for evaluating prejudice regarding a claim of prosecutorial misconduct].)

B. *Defendant's Forfeited "Vouching" Claims*

Defendant argues that the cumulative effect of certain comments by the prosecutor in closing argument added up to prejudicial misconduct. First, he argues that the prosecutor engaged in "improper vouching" when he told the jury in his initial closing argument that DNA was "the most reliable current method for establishing identity that science knows" and that when the jury reviewed Sentiwany's education, experience and knowledge, and the lab's processes, procedures, protocols, and quality assurance measures, it would find what the prosecutor thought was "the best that forensic science

has to offer." Defendant also argues misconduct occurred when the prosecutor said in rebuttal that DNA "is the most powerful tool yet developed by mankind to identify people."

Defendant concedes that his trial counsel did not object to any of these comments. The People assert that he has forfeited his "improper vouching" claim regarding these comments as a result, since "a criminal defendant must make a timely and specific objection and ask the trial court to admonish the jury to disregard the impropriety." (*People v. Cole* (2004) 33 Cal.4th 1158, 1201.) Defendant responds that the "persistence and magnitude" of the prosecutor's "vouching" was so great as to make any "additional" objection futile, citing *People v. Hill* (1998) 17 Cal.4th 800, 821.

Defendant's argument is unconvincing in light of defense counsel's failure to object at all to this category of statement. Also, as we will discuss, the purported "magnitude" of the prosecutor's other misstatements, assuming they were misconduct, was not so great as to render objection to the "vouching" complained of futile. Therefore, we conclude defendant has forfeited his "vouching" claim.

Even if we did not find forfeiture, and assuming for the sake of argument that the prosecutor's vouching was misconduct, there was no prejudice in light of the strong evidence presented against defendant, which included uncontradicted DNA evidence directly linking him to the sex crimes committed against Doe, and the trial court's instruction to the jury that the attorneys' remarks in their closing arguments were not evidence, and that "[o]nly the witnesses' answers are evidence." The questions raised by defense counsel in closing argument about the statistical methodology employed in this case were not supported by any significant evidence. Therefore, under both the state and federal standards, we find no prejudice. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836 [state]; *Chapman v. California*, *supra*, 386 U.S. at p. 24 [federal].)

C. *Defendant's Other "Vouching" Claims*

Defendant also argues the prosecutor improperly and prejudicially vouched for the evidence in the face of defense objections. Again, we disagree.

Defendant first raises the prosecutor's "guarantee" to the jury during rebuttal that the defendant had retested the DNA evidence at 15 loci, using the latest testing kit available, Identifiler. However, defendant does not place this comment in context. After the prosecutor made it, defense counsel objected that it was a "purely speculative" comment, and the court made the following statement to the jury:

"Ladies and gentlemen, if you don't remember the evidence and you want the court reporter to read back to you, the testimony, you can request that. Okay? Now, let me just say again that the attorney can only argue from the evidence that was presented."

The prosecutor then stated: "Right. Let me make it clear. You didn't have evidence of it but the judge has already made a ruling that I get to comment on the fact of the retest and any inferences that you can draw from that. That was already decided prior to this trial. What that means is that you get to know that [defense counsel] sent that DNA to be retested at a lab. Do you think knowing that he had a 15 loci profile for his client that he didn't ask that lab to do an Identifiler—"

When defense counsel objected, again on speculation grounds, the court had a sidebar with counsel, after which the prosecutor stated: "You will recall when I asked Ms. Sentiwany if the Identifiler kit, the one that tests up to 15 loci, if that's available to all defense labs that is produced by Applied Biosystems. What did she say? She said yes. So again, I told you before, I told you the first time, the defense has [no] obligation to present anything to you, but you can draw reasonable inferences about why they produced no evidence to contradict the match and [defense counsel] is conceding that the chemistry was correct."

Furthermore, as we have already discussed, the court instructed the jury that the attorneys' remarks in their closing arguments were not evidence, and that "[o]nly the witnesses' answers are evidence."

Given this context and instruction, we find no prejudicial misconduct by the prosecutor. The prosecutor's initial "guarantee" was speculative, as the prosecutor almost immediately acknowledged. As we have already discussed, and as the prosecutor told the jury, he was entitled to draw reasonable inferences from the state of the evidence,

including that the defense did not introduce any evidence of DNA retesting by it. To the extent the prosecutor's comments went beyond that, and assuming misconduct for the sake of argument, defendant fails to establish why the comments by the court and the prosecutor that followed, along with the court's jury instruction, did not sufficiently mitigate any prejudice that might otherwise have resulted. In light of these circumstances and the strong evidence against defendant, we conclude that they did so. (See *United States v. Necoechea* (9th Cir. 1993) 986 F.2d 1273, 1280-1281 [prosecutor's improper vouching about a witness's credibility based on facts not in evidence was harmless in light of the trial court's jury instructions]; *People v. Houston* (2005) 130 Cal.App.4th 279, 312 [jurors are presumed to follow a trial court's admonitions and instructions].)

Defendant also argues that the prosecutor engaged in misconduct later in his rebuttal. The prosecutor began by stating: "[Defense counsel is] tasked with representing a defendant charged with a crime so it's his job, if he can do it, to bring evidence to contradict prosecution evidence. [¶] So if there really were people out there seriously questioning the use of the product rule or its reliability, you would be hearing from those people."

Defendant objected to the statement as burden shifting. The court in effect sustained the objection, stating that the prosecutor was not correct in saying that it was defense counsel's "job, if he can do it, to bring in evidence to contradict prosecution evidence." The prosecution then acknowledged that the defense had no obligation. When the prosecutor asked the jury if it would not come forward with such evidence if it were representing defendant, regardless of whether or not it was obligated to do so, the defense again objected, and the trial court again sustained the objection, stating, "[t]hat's improper."

Again, assuming for the sake of argument that this was misconduct, we find no prejudice under the state and federal standards in light of the circumstances, which include the trial court's rulings admonitions and instruction to the jury, the strong evidence against defendant, and the trial court's sustaining of the defense objection. (See *People v. Fuiava* (2012) 53 Cal.4th 622, 687 ["the trial court's sustaining of defendant's

objections precluded any prejudice to defendant" resulting from improper questions by the prosecutor]; *People v. Bennett* (2009) 45 Cal.4th 577, 595, 612 [stating, regarding a claim of misconduct, "we assume the jury followed the admonition and that prejudice was therefore avoided"].) For these same reasons, we reject defendant's cumulative prejudice argument.

Finally, defendant argues that when the prosecution "disparaged the defense counsel by suggesting that the defense counsel was desperately trying to confuse the jury with respect to the validity of the DNA evidence because the California Supreme Court had already decided the issue, . . . there is a reasonable likelihood that the jury accepted the prosecution's remarks as an accurate statement of law (when in fact it was erroneous)." As we have already discussed, defendant fails to explain why the prosecutor could not point out that the California Supreme Court had found the evidence admissible. Furthermore, defendant does not cite any legal authority in support of his argument. Therefore, we disregard it. (*People v. Stanley*, *supra*, 10 Cal.4th at p. 793.)

DISPOSITION

The judgment is affirmed.

_____
Lambden, J.

We concur:

_____
Kline, P.J.

_____
Haerle, J.